

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ATHANASSIOS DIACAKIS, individually and on behalf of all others similarly situated,

Plaintiff,

VS.

COMCAST CORPORATION, and DOES 1-
10, inclusive.

Defendants.

No: C 11-3002 SBA

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

Dkt. 15

Plaintiff Athanassios Diakakis (“Plaintiff”), individually and on behalf of all others similarly situated, filed the instant putative class action against Defendant Comcast Corporation (“Comcast”), alleging that it violated various state consumer protection statutes by fraudulently marketing and selling service plans without disclosing associated equipment fees. The parties are presently before the Court on Defendant’s Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 15. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the motion for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

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1 **I. BACKGROUND**

2 **A. FACTUAL SUMMARY**

3 Comcast provides cable television, broadband internet, and telephone service to
 4 residential and commercial customers. In August 2011, Plaintiff contacted Comcast in
 5 response to advertisements for bundled packages (i.e., internet, cable television and
 6 telephone services for a single price). Id. ¶ 10. During the course of various telephone
 7 calls with Comcast, Plaintiff allegedly received numerous offers, including one for the
 8 “Triple Play” package, which bundled cable, telephone and internet services. Id. Plaintiff
 9 was informed that he would receive these services for a flat fee. Id. He was not advised
 10 that there was an additional charge for the modem necessary to receive those services. Id.
 11 Plaintiff ultimately agreed to the Triple Play package. He alleges that in making that
 12 decision, he relied on Comcast’s advertisements and representations, and his belief that
 13 there would be no additional monthly equipment lease fee. Id. ¶ 11.

14 Comcast subsequently provided Plaintiff with an Agreement for Residential Services
 15 (“Services Agreement”),¹ which states in pertinent part:

16 **Charges, Fees, and Taxes You Must Pay.** You agree to pay
 17 all charges associated with the Services, including, but not
 18 limited to ... Comcast Equipment (as defined below) charges ...
 19 **How We Will Bill You.** ... You will generally be billed
 20 monthly, in advance, for recurring service charges, equipment
 21 charges, and fees. **YOU MUST PAY, ON OR BEFORE THE**
 22 **DAY WE INSTALL ANY OR ALL OF THE SERVICES,**
 23 **THE FIRST MONTH’S SERVICE CHARGES,**
 24 **COMCAST EQUIPMENT CHARGES, ANY DEPOSITS,**
 25 **AND ANY INSTALLATION CHARGES.**

26 Def.’s Mot. at 2; Ex. A § 2(a), (b) (emphasis in original). The Services Agreement defines
 27 “Comcast Equipment” as “all new or reconditioned equipment installed, provided or leased
 28 to you by us or our agents, including, but not limited to ... cable modems ... and any other
 hardware excluding equipment purchased by you from Comcast.” Id. §6(a). Sometime

26 ¹ Plaintiff avers in his Complaint that he was “never informed” about equipment
 27 fees, and makes absolutely no reference therein to the Service Agreement. FAC ¶ 12. In
 28 response to the Motion to Dismiss to which the Service Agreement was attached, however,
 Plaintiff acknowledges that “Comcast later sent Plaintiff the Services Agreement.” Pl.’s
 Opp’n at 2.

1 thereafter, Comcast installed service at Plaintiff's residence. FAC ¶ 11. Plaintiff began
 2 receiving monthly bills which included an additional charge for a modem. *Id.* ¶ 12.

3 **B. PROCEDURAL HISTORY**

4 On May 13, 2011, Plaintiff filed a class action complaint in the San Francisco
 5 County Superior Court. Notice of Removal ¶ 3, Dkt. 1. On June 17, 2011, Comcast
 6 removed the action to this Court under the Class Action Fairness Act, 28 U.S.C. § 1332(d).
 7 Dkt. 1.

8 On June 24, 2011, Plaintiff filed a First Amended Complaint ("FAC") against
 9 Comcast alleging six state law causes of action for: (1) violation of California's Consumer
 10 Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq. ("CLRA"); (2) violation of
 11 California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. ("UCL");
 12 (3) violation of California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 et
 13 seq. ("FAL"); (4) fraud and deceit; (5) unjust enrichment; and (6) violation of
 14 Washington's Consumer Protection Act, RCW 19.68 et seq. ("CPA").

15 On August 8, 2011, Comcast filed the instant Motion to Dismiss Plaintiff's FAC.
 16 Dkt. 15. Comcast argues the FAC should be dismissed in its entirety without leave to
 17 amend. The motion has been fully briefed and are ripe for decision.

18 **II. LEGAL STANDARD**

19 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
 20 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support
 21 a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
 22 1990). In deciding a Rule 12(b)(6) motion, courts generally "consider only allegations
 23 contained in the pleadings, exhibits attached to the complaint, and matters properly subject
 24 to judicial notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The court is
 25 to "accept all factual allegations in the complaint as true and construe the pleadings in the
 26 light most favorable to the nonmoving party." Outdoor Media Group, Inc. v. City of
 27 Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). The allegations must "give the
 28 defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atl.

1 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted).
 2 Where a complaint or claim is dismissed, leave to amend generally is granted, unless
 3 further amendment would be futile. Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1087-88
 4 (9th Cir. 2002).

5 **III. DISCUSSION**

6 **A. CLRA**

7 The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or
 8 practices” in the sale or lease of goods or services. Cal. Civ. Code § 1770. In his first
 9 claim for relief, Plaintiff alleges that Comcast violated the CLRA’s proscriptions against:

10 (5) Representing that goods or services have sponsorship,
 approval, characteristics, ingredients, uses, benefits, or
 quantities which they do not have.

11 . . .

12 (9) Advertising goods and services with intent not to sell them
 as advertised.

13 . . .

14 (13) Making false or misleading statements of fact concerning
 reasons for, existence of, or amounts of price reductions.

15 (14) Representing that a transaction confers or involves right,
 remedies, or obligations which it does not have or involve, or
 which are prohibited by law.

16 Id. § 1770(a) (5), (9), (13), (14).

17 Comcast argues that Plaintiff’s CLRA claim fails as a matter of law for three
 18 reasons: (1) Comcast adequately disclosed the equipment charges in the Services
 19 Agreement; (2) no reasonable consumer would have been misled by Comcast’s
 20 representations; and (3) Plaintiff has not alleged his claim with sufficient particularity under
 21 Federal Rule of Civil Procedure 9(b). Def.’s Mot. at 6. The Court discusses these
 22 arguments in turn.

23 **1. Disclosure**

24 Comcast argues that the equipment fees at issue were adequately disclosed and
 25 authorized by Plaintiff in the Services Agreement, and therefore, his CLRA claim should be
 26 dismissed with prejudice. Def.’s Mot. at 6-7, 15. This contention lacks merit. The FAC

1 does not allege that Comcast acted inconsistently with the terms of the Service Agreement;
 2 rather, it alleges that Comcast made misrepresentations in its “marketing program”
 3 regarding the cost of the services being offered. FAC ¶¶ 27-30.² Thus, even if the modem
 4 fees were disclosed in writing, a CLRA claim nonetheless may be predicated on collateral
 5 misrepresentations made in the course of entering into the contract. “By its very language,
 6 subdivision (a)(14) of section 1770 contemplates the existence of collateral oral promises,
 7 representations or agreements which may be inconsistent with the rights, remedies, or
 8 obligations set out in a written contract; the [CLRA] makes such misrepresentations
 9 unlawful.” Wang v. Massey Chevrolet, 97 Cal. App. 4th 856, 870 (2002) (holding that
 10 plaintiffs may state a CLRA claim based on deceptive sales practices, even if defendant
 11 made a full disclosure of the lease terms in a written agreement signed by plaintiffs); Horne
 12 v. Harley-Davidson, Inc., 660 F. Supp. 2d 1152, 1159-60 (2009) (rejecting defendant’s
 13 argument that its compliance with a motorcycle service agreement precluded CLRA claim).
 14 As such, unfair and deceptive prior or contemporaneous representations can be actionable
 15 under the CLRA, despite the disclosure of information in subsequent a writing signed by
 16 the plaintiff.

17 Notably, the legal authorities relied upon by Comcast in its motion recognize that
 18 various consumer protection claims can be predicated on collateral representations that
 19 differ from contractual language. See Janda v. T-Mobile USA, Inc., 378 F. Appx. 705, 707
 20 (9th Cir. 2010) (affirming dismissal of UCL, FAL and CLRA claims based on
 21 unambiguous disclosure in Service Agreement, noting that “Plaintiffs do not identify any
 22 particular promotional brochures or in-store advertising that is allegedly deceptive[.]”);
 23

24 ² Plaintiff additionally argues for the first time in his opposition that the disclosures in
 Comcast’s Service Agreement are deceptive, and therefore inadequate. Pl.’s Opp’n at 5-7.
 25 That matter is not pled in the Complaint, which fails even to acknowledge the existence of the
 26 Service Agreement. See FAC. As such, this claim is not properly before the Court. See
Schneider v. Calif. Dep’t of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir.1998) (“‘new’,
 27 allegations contained in the [plaintiff]’s opposition [to the] motion, however, are irrelevant for
 Rule 12(b)(6) purposes.”). Plaintiff’s reliance on cases such as Schnall v. The Hertz Corp., 78
 28 Cal. App. 4th 1144, 1167 (2000), which address deception in the *manner* of disclosure (i.e.
 disclosure in secondary documents or obscured fine print), is therefore misplaced.

1 Lowden v. T-Mobile USA Inc., 378 Fed.Appx. 693, 695 (9th Cir. 2010) (dismissing
 2 Washington CPA claim based on unambiguous disclosure in Service Agreement where
 3 “[a]t no point does the complaint explain how any particular pre-sale advertising might
 4 have ‘induce[d] contract through deception[.]’”). Those cases do not stand for the
 5 proposition that disclosures in a Service Agreement necessarily preclude consumer
 6 protection claims related to pre-sale advertising.

7 **2. Deception**

8 Comcast next argues that Plaintiff’s CLRA claim fails as a matter of law on the
 9 ground that no reasonable consumer would have been misled by Comcast’s alleged actions.
 10 Def.’s Mot. at 9, 15. Claims made under California consumer protection statutes, including
 11 the CLRA, UCL and FAL—are governed by the “reasonable consumer” test, which focuses
 12 on whether “members of the public are likely to be deceived.” Williams v. Gerber Prods.
 13 Co., 522 F.3d 934, 938 (9th Cir. 2009) (citing Freeman v. Time, Inc., 68 F.3d 285, 289 (9th
 14 Cir. 1995)). “The question of whether a business practice is deceptive generally presents a
 15 question of fact not suited for resolution on a motion to dismiss. Werberl ex rel. v. Pepsico,
 16 Inc., No. C 09-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (citing
 17 Williams, 552 F.3d at 938). It is true that, “in certain instances, the court may be in a
 18 position to consider the viability of the alleged consumer law claims based on its review of
 19 the product packaging.” Werberl, 2010 WL 2673860, at *3 (citing Brockey v. Moore, 107
 20 Cal.App.4th 86, 100 (2003)). However, Defendant has not shown that such a determination
 21 may be made at this juncture.

22 As noted, Plaintiff’s CLRA claim is based on a Comcast’s “marketing program,”
 23 which allegedly failed to disclose the disputed equipment fees. FAC ¶¶ 28-29. The
 24 marketing efforts referenced by Plaintiff include advertisements and telephone
 25 conversations with Comcast representatives. Id. ¶ 10. In particular, Plaintiff alleges he was
 26 quoted a flat rate for bundled services, and was not informed of the equipment fees at issue.
 27 Whether Comcast’s representations and advertisements were likely to deceive the public is
 28 a question of fact not suitable for resolution on a motion to dismiss. Cf. Horne, 660 F.

1 Supp. 2d at 1162 (where defendant misrepresented or failed to disclose certain fees in its
 2 advertising, court held that whether “the representations concerning [those fees] was likely
 3 to mislead the public is a question better suited to resolution on summary judgment.”).
 4 Therefore, the Court declines to find that Comcast’s alleged actions were not misleading, as
 5 a matter of law, at this juncture.

6 **3. Particularity**

7 Next, Comcast maintains that Plaintiff’s CLRA claim fails to meet the particularity
 8 requirements of Rule 9(b). When fraud is alleged, plaintiff must plead with particularity
 9 the circumstances constituting fraud, while conditions of the mind, such as knowledge and
 10 intent, may be alleged generally. Fed. R. Civ. P. 9(b). To comport with Rule 9(b), the
 11 complaint must allege “the who, what, when, where, and how” of the alleged fraudulent
 12 conduct, Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997), and “set forth an explanation
 13 as to why the statement or omission complained of was false or misleading,” In re GlenFed,
 14 Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc).

15 Plaintiff does not dispute that his claims sound in fraud, but insists that he has
 16 provided sufficient detail to satisfy the heightened pleading requirements of Rule 9(b). The
 17 Court disagrees. Where consumer fraud claims are involved, “plaintiff must describe the
 18 content of the omission and where the omitted information should or could have been
 19 revealed, as well as provide representative samples of advertisements, offers, or other
 20 representations that plaintiff relied on to make her purchase and that failed to include the
 21 allegedly omitted information.” Marolda, 672 F. Supp. 2d at 1002. Here, Plaintiff’s
 22 recitation of the facts underlying his claims is presented in three tersely-worded paragraphs
 23 in the FAC. FAC ¶¶ 10-12. Plaintiff claims that he “contacted Comcast” between August
 24 11 and August 20 to purchase cable television service, and that such inquiry was made after
 25 “seeing Comcast advertisements for bundled packages.” In the course of multiple
 26 telephone conversations with unidentified Comcast representatives, Plaintiff purportedly
 27 received “numerous offers for monthly services.” Finally, Plaintiff avers that, “[he] was
 28 informed that he would receive the service . . . at a flat rate,” and was not informed that he

1 would be charged “for a modem rental, or a modem lease.” FAC ¶ 10. While Plaintiff
 2 provides no additional facts, vague references are made to Comcast’s “marketing program.”
 3 FAC ¶ 28.

4 The facts alleged fail to pass muster under the heightened pleading requirements of
 5 Rule 9(b). The FAC fails to specify when or where Comcast advertisements were viewed,
 6 the content of those advertisements, or which of them in particular Plaintiff relied upon.
 7 The FAC also neglects to indicate whether the ads were viewed in print, on television,
 8 online, or elsewhere. Regarding the telephone calls that took place sometime within a ten-
 9 day time-span, Plaintiff fails to allege any particular facts regarding those calls. Moreover,
 10 while Plaintiff alleges that various offers were made to him over the telephone, the terms of
 11 the particular offer Plaintiff purports to have accepted are not alleged. In short, the
 12 pleadings do not provide the requisite level of detail to satisfy Rule 9(b). Comcast’s motion
 13 to dismiss is therefore granted. Because this deficiency may be cured upon the allegation
 14 of additional facts, said dismissal is with leave to amend.

15 **B. UNFAIR COMPETITION LAW & FALSE ADVERTISING LAW**

16 Plaintiff’s second and third claims allege violations of the UCL and FAL,
 17 respectively. The UCL makes actionable any “unlawful, unfair or fraudulent business act
 18 or practice.” Cal. Bus. & Prof. Code § 17200. The FAL makes it unlawful to make or
 19 disseminate any statement concerning property or services that is “untrue or misleading....”
 20 Cal. Bus. & Prof. Code § 17500. Comcast’s arguments for dismissal of Plaintiff’s UCL
 21 and FAL claims are identical to those in support of dismissing the CLRA claim.

22 As with the CLRA, the disclosure of information in a written document is not a per
 23 se bar to UCL and FAL claims. See Wang, 97 Cal.App.4th at 871; Horne, 660 F.Supp.2d
 24 at 1161-1162; Duncan v. McCaffrey Group, Inc., 200 Cal. App. 4th 346, 368 (2011).
 25 Additionally, the UCL and FAL are governed by the reasonable consumer standard, and the
 26 question of whether Comcast’s representations were likely to deceive the public is not
 27 properly resolved here on a motion to dismiss. See Werberl, 2010 WL 2673860, at *3;
 28

1 Horne, 660 F. Supp. 2d at 1162. Thus, Comcast's arguments for dismissal of the UCL and
 2 FAL claims on those grounds are similarly unavailing.

3 The above notwithstanding, Plaintiff's UCL and FAL claims are "grounded in
 4 fraud" and therefore must be pled with specificity. Kearns, 567 F.3d at 1126. As discussed
 5 above, the FAC fails to provide the detail required to satisfy Rule 9(b). The inadequacy of
 6 the pleading vitiates all claims based on the alleged nondisclosure of equipment fees,
 7 including claims under the UCL and FAL. Therefore, Comcast's motion to dismiss is
 8 granted, and Plaintiff's UCL and FAL claims are dismissed with leave to amend.

9 **C. FRAUD**

10 Plaintiff's fourth claim alleges common law fraud. Comcast's motion to dismiss
 11 fails to specifically address this claim. However, as set forth above, the failure to satisfy
 12 the pleading requirements of Rule 9(b) vitiates all claims based on the alleged
 13 nondisclosure of equipment fees, including the common law fraud claim. Therefore,
 14 Plaintiff's fraud claim is dismissed with leave to amend.

15 **D. UNJUST ENRICHMENT**

16 Plaintiff's fifth claim alleges a claim for unjust enrichment. This Court has
 17 previously found that there is no independent claim for unjust enrichment. Newsom v.
18 Countrywide Home Loans, Inc., 714 F. Supp. 2d 1000, 1009-1010 (N.D. Cal. 2010). In
 19 any event, unjust enrichment is synonymous with restitution, id., which is an available
 20 remedy under the UCL, FAL and CLRA. Pfizer Inc. v. Super. Ct., 182 Cal. App. 4th 622,
 21 631 (2010); Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 694 (2006).
 22 As such, Plaintiff's claim for unjust enrichment—to the extent such a claim exists—is
 23 superfluous. See In re Apple and AT & T iPad Unlimited Data Plan Litig., -- F. Supp. 2d -
 24 -, 2011 WL 2847418, at *6 (N.D. Cal. July 18, 2011) ("plaintiffs cannot assert unjust
 25 enrichment claims that are merely duplicative of statutory or tort claims.") (citing cases).
 26 The Court therefore grants Defendant's motion and dismisses Plaintiff's unjust enrichment
 27 claim with prejudice.

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1 **E. WASHINGTON CONSUMER PROTECTION ACT**

2 Comcast moves to dismiss Plaintiff's claim under the Washington CPA for lack of
3 standing. Plaintiff responds by voluntarily dismissing said claim, pursuant to Rule 15(a) of
4 the Federal Rules of Civil Procedure. See Hells Canyon Preservation Council v. U.S.
5 Forest Serv., 403 F.3d 683, 687-688 (9th Cir. 2005). The Court therefore grants Plaintiff's
6 request to dismiss this claim and denies Defendant's motion to dismiss as moot.

7 **IV. CONCLUSION**

8 For the reasons stated above,

9 IT IS HEREBY ORDERED THAT:

10 1. Defendant's Motion to Dismiss is GRANTED with respect to Plaintiff's
11 CLRA, UCL, FAL, fraud and unjust enrichment claims. In light of Plaintiff's voluntary
12 dismissal of his Washington CPA claim, Defendant's motion to dismiss said claim is
13 DENIED AS MOOT.

14 2. Plaintiff is granted leave to amend his claims under the CLRA, UCL, FAL
15 and for fraud. Plaintiff shall have twenty-one (21) days from the date this Order is filed to
16 file a Second Amended Complaint. The failure to do so will result in the dismissal of the
17 action with prejudice.

18 3. The parties shall appear for a **telephonic** Case Management Conference on
19 February 22, 2012 at 3:30 p.m. Prior to the date scheduled for the conference, the parties
20 shall meet and confer and prepare a joint Case Management Conference Statement which
21 complies with the Standing Order for All Judges of the Northern District of California and
22 the Standing Orders of this Court. Plaintiff shall assume responsibility for filing the joint
23 statement no less than seven (7) days prior to the conference date. Plaintiff's counsel is to
24 set up the conference call with all the parties on the line and call chambers at (510) 637-
25 3559. NO PARTY SHALL CONTACT CHAMBERS DIRECTLY WITHOUT PRIOR
26 AUTHORIZATION OF THE COURT.

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1 4. This Order terminates Docket 15.
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3 IT IS SO ORDERED.

Dated: January 9, 2012


SAUNDRA BROWN ARMSTRONG
United States District Judge

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